MALAYSIAN REPORTS

ANG CHAI HA & ORS. v. SRI JAYA TRANSPORT CO. (P.T.M.) BHD.

[O.C.J. (Mohamed Azmi J.) November 2, 1973]
[Kuala Lumpur — Civil Suit No. 936 of 1971]

Negligence — Collision between motor car and bus admitted to be due to negligence of bus driver — Driver of motor car killed in accident — Death due to extensive burns when car caught fire on collision with bus — Presence of tins containing petrol in boot of car — Submission that death of deceased was neither caused by nor the direct consequence of the collision — Remoteness of damage — Intervening act — Plea of contributory negligence.

In this case a claim for damages was brought by the dependants of the deceased who died in a motor car accident when the motor car driven by him collided with a bus driven by a servant of the defendants. At the trial the defendants conceded that the collision between the two vehicles was due entirely to the negligence of the bus driver. The defendants however argued that they were not liable for damages for loss of support and dependency and for funeral expenses on the ground that the death of the deceased was neither caused by nor the direct consequence of the collision. It was common ground that the deceased died of extensive burns when his car caught fire on collision with the bus and that at the time of the accident the deceased had inside and in the boot of his car a total of eleven 4 gallon tins containing petrol. The defendants also pleaded contributory negligence.

Held: (1) on the pleadings and as the negligence alleged in the statement of claim had been admitted and there was no denial of the allegation that by reason of the negligence the deceased was killed and his widow and children have suffered damage, it must be assumed that the deceased was killed by reason of the negligence of the bus driver in colliding into the deceased's car. The question of foreseeability and intervening act of the deceased should not therefore arise;

(2) on the facts of this case the death of the deceased was not too remote and the defendants were therefore liable for the damages claimed;

(3) on the evidence the petrol carried in the car did not cause the fire which would in all probability have happened anyhow as a direct consequence of the collision. There was no *novus actus interveniens* in this case and there was no break in the claim of causation between the collision and the death;

(4) as the defendants have conceded that the collision occurred wholly by reason of the negligent driving of their bus driver, no question of contributory negligence could arise.

Cases referred to:-

(1) *The Paludina* [1925] P. 40; [1927] A.C. 16.
(2) *The Oropesa* [1942] P. 140; [1943] P. 32 at p. 40.
(3) *The Guildford* [1956] P. 364 at p. 370.
(4) *Re Polemis and Furness, Withling & Co.* [1921] 3 K.B. 560.
(5) *The Wagon Mound* [1961] 1 All E.R. 404; [1961] A.C. 388.
(6) *Doughty* v. *Turner Manufacturing Co. Ltd.* [1964] 1 All E.R. 98; [1964] 1 Q.B. 518.
(7) *Smith* v. *Leech Brain & Co. Ltd. & Anor.* [1961] 3 All E.R. 705; [1963] A.C. 837.
(8) *Hughes* v. *Lord Advocate* [1963] 1 All E.R. 705; [1963] A.C. 837.
(9) *The Calliope* [1970] P. 172.
(10) *Davies* v. *Swan Motor Co. (Swansea) Ltd.* [1949] 2 K.B. 291.
(12) *Stapley* v. *Gypson Mines Ltd.* [1953] A.C. 663.

CIVIL SUIT.

David Tay for the plaintiffs.

N. A. Marjoribanks for the defendants.

Mohamed Azmi J.: This is a claim for damages under section 7 of the Civil Law Ordinance, 1956 by the three dependents of Lance Corporal Yong Wai Kee of the Royal Malaysian Air Force who died in a motor accident on May 3, 1970. At the material time, the deceased was driving motorcar No. BK 433 along Jalan Lapangan Terbang in the direction of Kuala Lumpur, whilst motor bus No. BC 2823 driven by the servant of the defendants was proceeding along the same road in the opposite direction. Although in the Statement of Defence the defendants deny that their servant was guilty of any negligence, at the hearing they concede through their counsel that the collision between the two vehicles was due entirely to the negligence of their bus driver. However, the defendants argue that no damages for loss of support or dependency and no special damages for funeral expenses can be awarded to the plaintiffs on the ground that the death of the deceased was neither caused by nor the direct consequence of the collision. In the alternative, they aver that the deceased was guilty of contributory negligence.

As to remoteness of damage, it is common ground that at the time of the collision the deceased had inside and in the boot of his car a total of eleven 4-gallon tins containing petrol. It is also not seriously challenged that the deceased died of extensive burns when his car caught fire on collision with the bus. What did the deceased do to break the chain of causation between the collision and his death? According to the defendants, the carriage of the tins of petrol, which they contend was the cause of the fire, was the intervening act and, as such, the damage resulting from the fire was too remote and the items of damages claimed by the plaintiffs in this case could not be recovered. It is their submission that the existence of the tins of petrol in the car was not reasonably foreseeable. On the authority of *"The Paludina"*,(1) *"The Oropesa"*(2) and *"The Guildford"*,(3) it is submitted by the defendants that the burden of proof is on the plaintiffs to show that the damages are not too remote. But on the pleadings, the defendants have not denied specifically paragraph 3 of the Statement of Claim which alleges that, "By reason of the said negligence the deceased was killed and his widow and sons have suffered damage...". Since the said negligence has now been admitted and in the absence of any denial of paragraph 3 of the Statement of Claim, it must be assumed as a matter of pleading that the defendants admit that the deceased was killed by reason of the negligence of the bus driver in colliding into the deceased's car. The question of foreseeability and intervening act of the deceased should not therefore arise. However, should I be wrong here, it is necessary to consider whether or not the death of the deceased was too remote so as to render the damages claimed irrecoverable.

The law as to remoteness of damage as it relates to negligence has been well expounded in *James'* General Principles of the Law of Torts, Second Edition at pages 188 to 193. The issue of remoteness is essentially one of fact and there have been two competing theories. The first was the Court of Appeal rule in *Re Polemis and Furness, Withy & Co.*(4) that once liability in negligence is established the defendants will be held responsible for all direct consequences however unforeseeable, not the product of some extraneous

cause. The second theory in respect of remoteness of damage amounts to an assertion that the "duty" problem and the "damage" problem are identical and has been merged into one. As enunciated by the Judicial Committee of the Privy Council in the *Wagon Mound*,[5] in the law of negligence the test whether the consequences were reasonably foreseeable is a criterion alike of culpability (viz. breach of duty to take reasonable care) and of compensation. Thus, culpability and compensation are both governed by the rule of "reasonable foresight". What has to be considered is whether any specific item of damage in respect of which the plaintiffs' claim is such that at the time of the act or omission called in question the defendants ought to have foreseen the probability of it. Since the Court of Appeal itself has already accepted the *Wagon Mound* rule in *Doughty* v. *Turner Manufacturing Co. Ltd.*,[6] the second theory appears to have overruled the first theory. Applying the foreseeability test in the *Wagon Mound*, it is submitted on behalf of the defendants that the bus driver could not reasonably be expected to have known that the deceased would be carrying tins of petrol in his car. In my view, however, it is not unusual or improbable for a motorcar to carry a quantity of petrol although the same cannot be said of a car which carries a quantity of explosives such as bomb or nitro-glycerine. There is also no evidence that the deceased carried the petrol unlawfully or in contravention of any provision of the road traffic legislation. To my mind, the carriage of petrol in the car is not outside the realm of reasonable foresight. It should be borne in mind that, although the extent of liability in cases of remoteness of damage has now been curtailed by the *Wagon Mound* rule, the principle that a man is liable for all the damage that flows from his negligence is still good law, so that where the damage which in fact results from the negligence, although not foreseeable, is similar in type (as the damage in the *Wagon Mound* was not), to the damage which could have been foreseeable, then recovery will be allowed despite the lack of foreseeability. (See *Smith* v. *Leech Brain & Co. Ltd. & Anor.*[7]). It is true that in the present case the cause of death was extensive burns and not fractured skull or limbs, but one cannot run away from the fact that the damage suffered is death. Thus, in a motor accident, can one really say the damage, namely, death by extensive burns, is not similar in type to death by bodily injuries which is always foreseeable? It was held by the House of Lords in *Hughes* v. *Lord Advocate*[8] that the fact that the danger actually materialising was not identical with the danger reasonably foreseeable did not necessarily result in liability not arising. In that case, it was a reasonably foreseeable danger that a child could be injured by burns but not through an explosion. Nevertheless, liability was found against the defendant. Applying the same principle to the present case, even if the death by extensive burns which actually materialised is not identical with death by bodily injuries, which is reasonably foreseeable, it does not necessarily absolve the defendants from liability. In any event, I hold that in a collision between two vehicles, particularly in a head-on collision, fire is always a hazard and that injury or death by fire is a foreseeable consequence. I am, therefore, of the view that the death of the deceased cannot be considered as reasonably unforeseeable at the time of the head-on collision. Further, on the evidence, the deceased's car caught fire as a result of a spark produced by the collision between the two vehicles and that spark was brought about by the negligent driving of the defendants' bus driver. I therefore hold that on the facts of this case the death of the deceased was not too remote and I accordingly find the defendants liable for the damages claimed.

With regard to the alleged intervening act, namely, the carriage of tins of petrol, even if negligence is proved it must be causative. The case of *"The Calliope"*[9] has been referred to by learned counsel for the defence. In that case, the defendants' vessel *"Calliope"* collided with the plaintiffs' vessel *"Carlsholm"* in River Seine whilst proceeding down-river. She ran aground and was damaged, but she was able to refloat herself and proceeded up-river. Next day, whilst executing a turning manoeuvre in the river, she grounded twice and collided with a tug which was assisting her sustaining further damage. It was agreed that *"Carlsholm"* was 45 per cent at fault and the *"Calliope"* 55 per cent for the collision, and that the damage sustained by the *"Calliope"* as a result of the first grounding was a direct consequence of the collision. The question, however, arose whether the damage she sustained as a result of the two latter groundings formed part of the claim against the *"Carlsholm"* and, if so, whether the court could sub-apportion liability for that damage. Based on section 1(1) of the Maritime Conventions Act, 1911 which requires liability to be apportioned in accordance with the degree of fault of each vessel, Brandon J. held that in such a case it was open to the court that the damage sustained during the two latter groundings was caused partly by the collision and partly by the *"Calliope's"* own intervening negligence in executing the turning manoeuvre, and to make a further apportionment or sub-apportionment of liability. Although the law raised there involves the inter-relationship of the doctrine of contributory negligence and remoteness of damage, and the principle that one head of damage to a vessel may be apportioned on one basis and another head resulting from the same event on a different basis, the facts in that case are distinguishable. In the present case, there was only one collision and the deceased's car immediately caught fire burning him to death. It is submitted on behalf of the defendants that the Chemist Report Exhibit AB7 shows that the fire was most probably caused by a spark igniting the petrol that was being carried in the deceased's car, as a result of which, he was burned to death. If so, then the death of the deceased was not the direct cause of the collision but that of the eleven tins of petrol which the deceased had in his car. However, the Chemist Report also makes the following findings:

> "I examined the car and found it to be badly damaged and gutted with fire. Inside the car and in the boot of the car I found a total of eleven 4-gallon tins. One of the tins was closed and appeared to be full of liquid while the other tins were open and had varying quantities of liquid.
>
> I instructed Inspector Tan to collect samples of liquid from the tins and send them to the laboratory for analysis."

It is therefore established from the above findings that the petrol inside the tins was not totally affected by the fire. If the petrol was in fact the direct cause of the fire after the impact, then it would have been totally

burnt out and there would have been no petrol left in the tins. Further, these tins should have been so badly affected by the heat that one would not have expected to find one of the tins, which was closed, to be still full of petrol. As pointed out by learned counsel for the plaintiffs, assuming that the fire had been put out by a fire-engine, then one would have expected to have found some water together with the petrol in the tins that were not closed, and therefore in the samples sent for analysis. But there is no evidence of any water found with the petrol in the Chemist Report. I therefore find that these findings in the report do not support the conclusion that the fire was most probably started by the petrol in the tins being ignited — assuming that the Chemist did make such a conclusion in his report. It is common knowledge that vehicles do occasionally catch fire immediately after collision in a road accident, even if they do not carry any tin of petrol. It should be noted that this was a head-on collision. (See sketch plan Exhibit AB1). From the Chemist Report, the damaged front portion of the bus was also burnt. Under the circumstances, it is more probable that the fire had commenced from the engine portion of the car rather than from the eleven tins of petrol. In any event, there is no denying that the fire in this case was caused by a spark produced by the impact between the two vehicles which is the direct consequence of the bus driver's negligence. On the evidence, I find the petrol carried in the car did not therefore cause the fire which, to my mind, would in all probabilities have happened anyhow as a direct consequence of the collision. Thus, there was no novus actus interveniens in this case. In my view, there was no break in the chain of causation between the collision and his death.

On the issue of contributory negligence, learned counsel for the defendants have cited *Davies* v. *Swan Motor Co. (Swansea) Ld.*,[10] *Jones* v. *Livox Quarries Ld.*[11] and *Stapley* v. *Gypsum Mines Ld.*[12] In all these cases, it would appear that the defendants had denied negligence and claimed that any damages which might be awarded should be reduced on account of contributory negligence of the deceased or injured person. But in the present case, the defendants have through their counsel conceded that the collision occurred wholly by reason of the negligence driving of their bus driver and, as such, I do not see how the question of contributory negligence can arise on the part of the deceased. I entirely agree with the submission of learned counsel for the plaintiffs that contributory negligence only comes into operation where the question of liability for negligence is in dispute. It is only in relation to the causation of the collision that one has to consider contributory negligence. Having admitted that the bus driver is 100 per cent to blame for the collision, and there being only one collision, I hold that the question of contributory negligence does not arise.

As regards damages, a sum of $1,000 has been agreed as special damages. With regard to general damages, it is not in dispute that the deceased left surviving him the three plaintiffs as dependants, and that as a Lance Corporal his total earning was $200 per month. The plaintiffs, however, claim that the deceased was earning an additional $200 per month as a car-broker. They sought to prove this extra income from the oral testimony of the deceased's wife (PW1). According to her, the deceased became a self-employed car-broker since 1967 and did his business through friends. She says the deceased told her that he earned about $200 a month from the car brokerage. From the evidence, it would appear that the deceased was on duty for twenty-four hours a day for two weeks in a month. As a Lance Corporal in the Royal Malaysian Air Force, I find it improbable that he could find the time and energy to be a car-broker at the same time. None of the friends through whom he was alleged to do business has come forward to give evidence and no attempt has been made to produce facts and figures on which the court could determine the alleged extra income. Thus, even if it could be proved that the deceased was in that business on a part-time basis, it is my considered opinion that the evidence of the wife on the additional income of $200 is too scanty to merit serious consideration. I therefore hold that the proven income of the deceased at the time of his death was $200 per month and not $400 as alleged. Out of this sum, $30 should be deducted as deceased's own expenses. Damages for loss of dependency is accordingly assessed at $170 per month. As regards the deceased's working life expectation, I take into consideration that he was twenty-six years old at the time of his death and that there is no evidence to suggest that he was not leading a healthy life. Taking into consideration all contingencies in life, it is my view that he would be gainfully employed up to the age of fifty-five years if the unfortunate accident had not happened. I find a purchase of twenty-nine years is fair and appropriate in this case.

In the event, I enter judgment for the plaintiffs in the sum of $1,000 as special damages and $30,885.60 as general damages for loss of dependency, and costs. I also order interest to be paid on special damages from date of accident (3rd May, 1970) at 3% per annum, and on general damages from date of issue of writ (4th November, 1971) at 6% per annum to date of payment. The sum awarded as special damages shall be paid direct to the widow. As regards general damages, the amount awarded shall be apportioned as follows: —

(1) Ang Chai Ha — widow - - $20,885.60;
(2) Yong Kim Hong — son - - $ 5,000.00;
(3) Yong Kim Mun — son - - $ 5,000.00.

Monies payable to the two minor children (2) and (3) shall be deposited with the Public Trustee Malaysia for their maintenance until they reach the age of majority, with liberty to apply.

Order accordingly.

Solicitors: *Murphy & Dunbar; Lovelace & Hastings.*